No. 85-969

In the Supreme Court of the United States

OCTOBER TERM, 1985

LAWRENCE E. GRAY, ET AL., PETITIONERS

v.

OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the comprehensive remedial scheme established by Congress in the Civil Service Reform Act of 1978 precludes judicial review of personnel claims by federal employees under the Administrative Procedure Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

Page

Cases—Continued:

Statutes:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 771 F.2d 1504. The opinion of the district court (Pet. App. 23a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 34a-35a) was entered on August 9, 1985, and a petition for rehearing was denied on October 7, 1985 (Pet. App. 36a). The petition for a writ of certiorari was filed on December 6, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are three Administrative Law Judges in the Department of Labor. In August 1981, 39 of their colleagues were promoted from the GS-15 pay level to GS-16 pursuant to a reorganization plan issued by the

Office of Personnel Management (OPM). Petitioners filed an appeal with OPM in late 1981, contending that various statutory and regulatory provisions entitled them to be promoted as well. Upon investigating petitioners' complaint, OPM determined that the Department had failed properly to implement the reorganization plan. Accordingly, OPM froze additional promotions and determined not to act on individual appeals until the entire situation could be resolved. Pet. App. 2a-5a.

In February 1983, petitioners filed this action in the United States District Court for the District of Columbia, seeking, inter alia, an injunction compelling OPM to direct their promotions and back pay for the difference between GS-16 and GS-15 benefits retroactive to August 1981.[1] They contended primarily that OPM's failure to promote them violated applicable personnel regulations and the requirement that they receive "equal pay for substantially equal work." 5 U.S.C. 5101(1)(A). The district court dismissed the complaint for want of subject matter jurisdiction. Pet. App. 23a-33a. Relying on *Carducci* v. *Regan*, 714 F.2d 171 (D.C. Cir. 1983), the district court held that the comprehensive remedial scheme established by Congress in the Civil Service Reform Act of 1978 (CSRA) precludes direct judicial review of petitioners' claims under the Administrative Procedure Act (APA). Pet. App. 25a-30a.

2. The court of appeals affirmed. Pet. App. 1a-22a.[2] The court of appeals concluded that *Carducci* was dispositive of

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[1]The complaint of another ALJ, Melvin Warshaw, was consolidated with petitioners' action in the district court and on appeal. Pet. App. 6a, 7a. Warshaw has not sought review in this Court.

[2]Following the district court's decision, OPM was able to approve several additional GS-16 positions for Department of Labor ALJs, and petitioners were among those who were promoted. See Pet. App. 19a; Gov't C.A. Br. 7, 38-39. Petitioners continued this action apparently in the hopes of obtaining back pay and certain other benefits.

petitioners' claims under the APA; it rejected petitioners' argument that ALJs should be excepted from the *Carducci* rule on the ground that such an exception would improperly "confer special status on ALJs beyond that expressly provided by Congress." Pet. App. 13a. The court of appeals also noted that petitioners "are by no means being left remediless" because they are able to present their claims to the Special Counsel of the Merit Systems Protection Board, who is obligated to investigate claims of prohibited personnel practices and is authorized to seek corrective action where such practices have been found. *Id.* at 17a (footnote omitted); see 5 U.S.C. 1206; *Barnhart* v. *Devine*, 771 F.2d 1515, 1525 (D.C. Cir. 1985). Accordingly, the court of appeals held that "the ready availability of the elaborate administrative apparatus fashioned by Congress in the CSRA" (Pet. App. 16a) precludes judicial review of petitioners' claims under the APA.

ARGUMENT

Petitioners argue (Pet. 5-14) that they are entitled to direct judicial review of their nonconstitutional claim that they should have been promoted from GS-15 to GS-16 earlier than they in fact were, notwithstanding the comprehensive administrative remedial scheme established by Congress in the CSRA.[3] The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals that has considered similar minor personnel claims. Moreover, this Court has recently declined to review a contention identical to petitioners' in *Pinar* v. *Dole*, No. 84-1167 (Apr. 15, 1985). See also *Krodel* v. *Young*, cert. denied, No. 84-1642 (Oct. 7, 1985); *Cazalas*

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[3]Petitioners do not challenge the disposition of their constitutional claims, which were patently without merit. See Pet. 3 n.2; Appellants' C.A. Br. 3 n.2; Pet. App. 18a-19a & n.13, 31a-32a.

v. *United States Department of Justice,* cert. denied, No. 84-56 (Feb. 19, 1985). There is no reason for a different result here.[4]

As petitioners concede (Pet. 5), the overwhelming weight of appellate authority holds that the Civil Service Reform Act of 1978 precludes direct judicial review under the APA of personnel claims by federal employees. See, *e.g., Weatherford* v. *Dole,* 763 F.2d 392 (10th Cir. 1985); *Pinar* v. *Dole,* 747 F.2d 899, 912-913 (4th Cir. 1984), cert. denied, No. 84-1167 (Apr. 15, 1985); *Veit* v. *Heckler,* 746 F.2d 508, 510-511 (9th Cir. 1984); *Carducci* v. *Regan,* 714 F.2d 171, 173-175 (D.C. Cir. 1983); *Broadway* v. *Block,* 694 F.2d

[4]Although neither the parties nor the court of appeals addressed the issue, we note that petitioners properly took their appeal to the District of Columbia Circuit. Petitioners sought money damages (in addition to prospective relief) and relied in part on 28 U.S.C. 1346 as a basis for jurisdiction in the district court. See C.A. App. 20. This claim, however, was wholly without merit: "Congress has not made available to a party wrongfully classified the remedy of money damages through retroactive classification." *United States* v. *Testan,* 424 U.S. 392, 403 (1976); see also 5 U.S.C. 5596(b)(1) (back pay available only where employee has suffered the "withdrawal or reduction" of his pay); 5 U.S.C. 5596(b)(2) (back pay not available with respect to "any reclassification action"); Pet. App. 19a-20a n.13, 21a. Thus, while the Federal Circuit has exclusive jurisdiction over appeals where the jurisdiction of the district court is based on 28 U.S.C. 1346, see 28 U.S.C. 1295(a)(2), the frivolous nature of petitioners' claim for monetary relief justifies the District of Columbia Circuit's retention of jurisdiction here. See *Van Drasek* v. *Lehman,* 762 F.2d 1065, 1070-1071 & n.9 (D.C. Cir. 1985); cf. *Maier* v. *Orr,* 754 F.2d 973, 982 (Fed. Cir. 1985) (a plaintiff's "mere recitation of a basis for jurisdiction [cannot] alter the scope of [the Federal Circuit's] statutory mandate"). There is accordingly no basis on which to grant the petition and order the case remanded for transfer to the Federal Circuit pursuant to 28 U.S.C. 1631, a course that this Court has recently followed in cases in which it determined that the regional court of appeals lacked jurisdiction under 28 U.S.C. 1295(a)(2). See *Chula Vista City School District* v. *Bennett,* No. 85-833 (Jan. 27, 1986); *Pacyna* v. *Marsh,* No. 84-1706 (Jan. 21, 1986); *Ballam* v. *United States,* No. 84-1750 (Jan. 21, 1986). But see *United States* v. *Squillacote,* cert. denied, No. 84-1284 (Apr. 15, 1985).

979, 986 (5th Cir. 1982); see also *Schrachta* v. *Curtis,* 752 F.2d 1257 (7th Cir. 1985); *Hallock* v. *Moses,* 731 F.2d 754 (11th Cir. 1984); *Braun* v. *United States,* 707 F.2d 922 (6th Cir. 1983); cf. *Bush* v. *Lucas,* 462 U.S. 367 (1983) (in view of civil service remedies, federal employee may not bring *Bivens* action against his superiors).[5]

These decisions are plainly correct. In the CSRA, Congress prescribed "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations." *Bush* v. *Lucas,* 462 U.S. at 388. The statute provides that employees subject to particularly serious deprivations, such as removal or lengthy suspension, are entitled to obtain administrative review before the Merit Systems Protection Board (MSPB) and judicial review of the Board's decision. 5 U.S.C. 7512, 7513(d), 7703(a)(1). Employees also have recourse to the Special Counsel, whose function is to ensure the effective implementation of merit systems principles, which require, inter alia, "fair and equitable treatment," "[e]qual pay * * * for work of equal value," and "protect[ion] against arbitrary action, personal favoritism, or coercion for partisan

[5]In *Burroughs* v. *OPM,* 764 F.2d 1300 (1985), a panel of the Ninth Circuit held that 28 U.S.C. 1361 permits judicial review of personnel claims via mandamus. The court of appeals, however, failed to recognize the significance of its earlier decision in *Veit* v. *Heckler, supra,* and it mistakenly relied on a 1976 decision of the District of Columbia Circuit, *Haneke* v. *Secretary of Health, Education & Welfare,* 535 F.2d 1291, for the proposition that classification claims may be reviewed by way of mandamus, a view since rejected by that court in light of the procedures established in the CSRA. See *Barnhart* v. *Devine,* 771 F.2d 1515 (D.C. Cir. 1985). The government has filed a petition for rehearing in *Burroughs;* the court of appeals has called for a response but has not yet acted on the petition. The Ninth Circuit has recently reaffirmed its holding in *Veit* v. *Heckler, supra,* that "in enacting the C.S.R.A. Congress meant to limit the remedies of federal employees bringing claims closely intertwined with their conditions of employment to those remedies provided in the statute." *Lehman* v. *Morrissey,* 779 F.2d 526, 527-528 (1985).

political purposes." 5 U.S.C. 2301(b)(2), (3) and (8)(A); see 5 U.S.C. 1204, 1206; page 3, *supra*. Where the Special Counsel decides to prosecute a claim before the MSPB, the employee may obtain judicial review of an adverse decision by the Board; however, should the Special Counsel find the claim unmeritorious following his investigation, Congress has not provided for further review. See generally *Perez* v. *Army & Air Force Exchange Service*, 680 F.2d 779, 787-788 (D.C. Cir. 1982).

In view of this carefully crafted scheme, the courts of appeals have properly concluded that Congress's "failure to include some types of nonmajor personnel action within the remedial scheme of so comprehensive a piece of legislation reflects a congressional intent that no judicial relief be available." *Carducci* v. *Regan*, 714 F.2d at 174 (footnote omitted). Similarly, in *Pinar* v. *Dole*, *supra*, the court held that "[t]he absence of a provision for direct judicial review of prohibited personnel actions among the carefully structured remedial provisions of the CSRA is evidence of Congress' intent that no judicial review in district court be available." 747 F.2d at 910; *id.* at 912 (relying on 5 U.S.C. 701(a)(1) (judicial review unavailable where the relevant statute "precludes judicial review") and 5 U.S.C. 701(a)(2) (judicial review unavailable where "agency action is committed to agency discretion by law")); see also *Veit* v. *Heckler*, 746 F.2d at 511 ("the comprehensive nature of the procedures and remedies provided by the CSRA indicates a clear congressional intent to permit federal court review as provided in the CSRA or not at all"); *Broadway* v. *Block*, 694 F.2d at 986 ("declin[ing] to allow an employee to circumvent this detailed scheme governing federal employer-employee relations by suing under the more general APA").

The conclusion that the CSRA, taken as a whole, establishes Congress's intent to preclude direct judicial review of personnel actions under the APA is faithful to this Court's

admonition that "[w]hether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block* v. *Community Nutrition Institute*, No. 83-458 (June 4, 1984), slip op. 5. In holding that "the presumption favoring judicial review of administrative action may be overcome by inference of intent drawn from the statutory scheme as a whole," the Court emphasized in *Community Nutrition Institute* that " 'clear and convincing evidence' " of an intent to preclude review is not required "in the strict evidentiary sense." *Id.* at 9, 10. Rather, review is unavailable whenever "the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.' " *Id.* at 10 (citation omitted).[6] That intent is plainly apparent here in light of Congress's determination in the CSRA not to authorize judicial review of classification decisions made by OPM under 5 U.S.C. 5112(a). Cf. *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982) ("[i]n the context of the [Medicare] statute's precisely drawn provisions," Congress's "fail[ure] to authorize further review" of certain determinations "provides persuasive evidence that Congress deliberately intended to foreclose further review of such claims").

Moreover, permitting review in circumstances such as these would lead to the anomaly that minor personnel claims would be directly reviewable in federal court, while employees with far more serious claims, such as removal, would be required to proceed before the MSPB. And it would be particularly peculiar to permit suits under the APA, with review in the regional courts of appeals, because

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[6]Petitioners' repeated insistence (Pet. 6, 7, 8-9) on "clear and convincing evidence" of Congress's intent and on an "express" intention to preclude review all but ignores this Court's comprehensive discussion in *Community Nutrition Institute*.

that would frustrate Congress's efforts to centralize judicial consideration of federal personnel claims in the Federal Circuit. See 28 U.S.C. 1295(a)(9).[7]

The case on which petitioners rely for their claim of a conflict, *Dugan* v. *Ramsay*, 727 F.2d 192 (1st Cir. 1984), is distinguishable.[8] That case allowed review of a substantial

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[7]Petitioners' contention (Pet. 9) that direct judicial review of their claim is required because they would not ultimately be able to obtain review of a decision by the Special Counsel rejecting their claim ignores the fact that Congress's decision not to provide judicial review in these circumstances reflects a balance of competing policy considerations, such as the severity of the deprivation, the disruption to the ability of agencies to carry out their mission caused by judicial intrusion into largely discretionary, day-to-day personnel decisions, and the burden that would be imposed on the federal courts if they were required to act as the tribunal of first resort for review of the myriad of minor personnel claims that inevitably arise in a workforce as large as the federal government's. Thus, even if petitioners' "civil service remedies [are] not as effective as" an action under the APA, *Bush* v. *Lucas*, 462 U.S. at 372, Congress's decision in the CSRA that judicial review of certain types of claims is, on balance, unwarranted must be controlling. Finally, as the court of appeals noted (Pet. App. 17a-18a), petitioners may still be able to obtain relief through the Special Counsel.

[8]This Court denied certiorari in *Pinar* v. *Dole*, No. 84-1167 (Apr. 15, 1985), notwithstanding the claim of a conflict with *Dugan*. See 84-1167 Pet. 7. Petitioners also contend (Pet. 10-14) that *Dugan* and certain earlier cases of the District of Columbia Circuit establish a special exception to nonreviewability for ALJs. *Dugan*, however, nowhere relies on special considerations involving ALJs in holding that the refusal to hire an applicant for an ALJ position is reviewable under the APA (see 727 F.2d at 194-195), and the court of appeals in this case correctly determined that its own decisions on which petitioners rely are not controlling (Pet. App. 12a-13a). As the court of appeals recognized (*id.* at 13a-14a), Congress established special provisions governing review of serious actions taken against ALJs, 5 U.S.C. 7521, but not minor claims such as the one at issue here. While ALJs undeniably play an important role in the administration of federal regulatory regimes, it would be inconsistent with Congress's decision in Section 7521 to grant them a significant degree of additional protection, but no more, to confer on ALJs the unique benefit of judicial review of minor personnel claims. Should petitioners and their supporting amicus believe that

deprivation, the refusal to hire an applicant, rather than the comparatively minor claim presented here that petitioners were not promoted in a timely fashion. See *Tucker* v. *Defense Mapping Agency*, 607 F. Supp. 1232, 1241 n.7 (D.R.I. 1985) (distinguishing *Dugan* as involving an applicant for employment and concluding that "regular [federal] employees * * * are barred from the pursuit of remedies alien to the CSRA scheme").[9] Indeed, the court of appeals in *Dugan* failed to discuss or even cite *Carducci* v. *Regan*, *supra*, and *Broadway* v. *Block*, *supra*. Furthermore, the government in *Dugan* did not argue, as we do here, that the employee should have sought relief before the Special Counsel. See 727 F.2d at 194. It is also significant that the court of appeals in *Dugan* required "clear and convincing evidence" of an intent to preclude review and reasoned that "the law * * * almost never implies statutory preclusion of review from congressional silence," 727 F.2d at 195, premises that are no longer wholly accurate in light of this Court's decision in *Community Nutrition Institute*, which was decided several months after *Dugan*. See page 7, *supra*. The First Circuit has not yet had the opportunity to reconsider its decision in light of *Community Nutrition Institute* and the unanimous decisions of the other courts of appeals that have considered the question. Finally, we are not aware of any case in which the First Circuit or any other court of appeals has relied on *Dugan* to permit review of a personnel

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further protections for ALJs are necessary in circumstances such as these (and they make no showing that they are), that contention is properly addressed to Congress, not to this Court.

[9]Very little remains at stake in this lawsuit. Petitioners have received their promotions, and they are not entitled to back pay. See notes 2, 4, *supra*. Apparently, all that primarily remains is whether petitioners are now entitled to a higher step level within GS-16 than they currently enjoy.

claim under the APA. For all these reasons, there is no need for the Court to resolve whatever conflict might exist at this time.[10]

[10]Petitioners argue for the first time in this litigation (Supp. Br. 1-5) that 5 U.S.C. 559 requires that their claim be subject to judicial review. There is, of course, no excuse for petitioners' failure to discover this 30 year old statute until "a week and a half after [they] filed for a writ of certiorari" (Supp. Br. 3), and they do not even attempt to suggest the sort of "exceptional circumstances" that alone might justify this Court's consideration of such a tardily presented contention. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); see also, *e.g.*, *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). In any event, their argument, which would require the Court to overrule its recent decision in *Community Nutrition Institute*, is without merit. Section 559 merely states a rule of construction requiring that Congress's intention to preclude judicial review be clear. *Association of Data Processing Service Organizations, Inc.* v. *Board of Governors of the Federal Reserve System*, 745 F.2d 677, 686 (D.C. Cir. 1984); *Attorney General's Manual on the Administrative Procedure Act* 139 (1947). As this Court has emphasized, Section 559 does not "require the Congress to employ magical passwords in order to effectuate an exemption from the [APA]." *Marcello* v. *Bonds*, 349 U.S. 302, 310 (1955). Accordingly, Section 559 does not prevent Congress from overcoming the presumption in favor of judicial review by establishing a comprehensive alternative remedial scheme, as here. None of the cases on which petitioners rely is to the contrary. See, *e.g.*, *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 51 (1955) (statutory provision that deportation orders would be "final" did not preclude review under the APA).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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